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In the Supreme Court of the United States

OCTOBER TERM, 1984

ARKANSAS POWER & LIGHT CO., ET AL., PETITIONERS

v.

UNION OF CONCERNED SCIENTISTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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Petitioners contend that the court of appeals erred by failing to defer to the Nuclear Regulatory Commission's conclusion that, under 42 U.S.C. 2239(a), the results of "emergency preparedness tests" need not be addressed at formal hearings prior to the issuance of a nuclear power plant's operating license.

1. The Atomic Energy Act (42 U.S.C. 2011 *et seq.*) establishes a three-step procedure for the licensing of nuclear power plants. The applicant for a license must first obtain a construction permit; before a permit is issued, a public hearing will be held by the Nuclear Regulatory Commission (NRC or Commission). 42 U.S.C. 2239(a). The prospective operator then may apply for an operating license. Before issuance of a license is authorized, a Commission licensing board must hold another hearing to consider the application, if one is requested by an interested party. *Ibid.*; see 10

C.F.R. 2.104, 2.760. Meanwhile, the Commission staff will conduct preoperational tests to ensure that the plant is operating as anticipated. If all is in order, the Commission will then actually issue the license. 10 C.F.R. 2.760, 2.760a.

One of the prerequisites established by the Commission for the issuance of a license is the requirement that prospective operators have adequate offsite emergency plans. 10 C.F.R. 50.33(g), 50.47(a). To help give force to this standard, the Commission has conditioned the grant of a license on the completion of a "full-scale [emergency preparedness] exercise" no more than one year before a license is issued. 10 C.F.R. 50.47(b)(14); 10 C.F.R. Pt. 50, App. E § IV.F.1. When first promulgated, the regulation establishing this exercise requirement did not state whether the results of preparedness tests would be addressed at preauthorization hearings held before licensing boards. To clarify this point, the Commission amended the emergency preparedness rule to provide that "[e]mergency preparedness exercises * * * are part of the operational inspection process and are not required for any initial licensing decision." 10 C.F.R. 50.47(a)(2). Under the amended rule, while successful completion of an exercise remained a prerequisite to the issuance of a license by the NRC, the results of the exercise were to be evaluated by the Commission staff as part of its preoperational testing, rather than by a licensing board at a preauthorization hearing.[1]

The respondents in this case petitioned the court of appeals to set aside the amended rule, arguing that it is inconsistent with 42 U.S.C. 2239(a) because it denies interested parties a hearing on issues of fact material to the

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[1]The Commission explained that preparedness tests can most fruitfully be conducted when the plant is ready to operate. 47 Fed. Reg. 30323 (1982). To hold hearings at that late date, the NRC concluded, would be impractical. 48 Fed. Reg. 16691, 16693 (1983).

Commission's licensing decisions. A divided panel of the District of Columbia Circuit agreed, ruling that the Commission erred by "remov[ing] so material an issue as the results of offsite emergency preparedness [tests] from required section [2239(a)] hearings" (Pet. App. 30a). The court explained that "[s]ince the NRC, by its own regulations, has made correction of deficiencies identified in emergency exercises a requirement of its ultimate licensing decision, it would seem to follow that results of these exercises must be subject to the section [2239(a)] hearing requirement" (*id.* at 11a).

2. We agree with petitioners that the decision below is incorrect. Neither Section 2239(a) nor its legislative history prescribes the issues that must be addressed by the Commission at a pre-licensing hearing. In such circumstances, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc.* v. *NRDC, Inc.*, No. 82-1005 (June 25, 1984), slip op. 6.

Indeed, this Court repeatedly has emphasized "the fundamental administrative law principle that 'the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments.' " *Costle* v. *Pacific Legal Foundation,* 445 U.S. 198, 215 (1980), quoting *Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519, 524 (1978). As a result, the Court has clearly explained that statutory hearing requirements do " 'not preclude [agencies] from particularizing statutory [hearing] standards through the rulemaking process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived.' " *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620 (1973), quoting *FPC* v. *Texaco,* 377

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U.S. 33, 39 (1964). See *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 762 (1973); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956). Here, the court of appeals entirely failed to reconcile its holding with these lines of authority.

3. Although erroneous in our view, the court of appeals' decision is written narrowly, and it therefore may have only a limited effect on the administration of the Atomic Energy Act. For this reason, we have not felt justified in seeking review by this Court at the present time.

The court of appeals suggested, for example, that the Commission might adopt as a "substantive licensing standard" the proposition that a preparedness test is completed successfully whenever the exercise does not reveal "fundamental[] flaw[s]" in the underlying emergency preparedness plan (Pet. App. 23a). Under such a standard, the Commission would be free to "summarily dismiss any claim that did not raise genuine issues of material fact" about the adequacy of a plan (*id.* at 24a). Similarly, the court left open the possibility that the Commission could hold a "special supplementary hearing solely on issues raised by the emergency exercises closer to the date of full power operation" (*id.* at 23a), or could "use expedited procedures to shorten the period between the exercises and the date of license" (*id.* at 24a). Equally as important, the court of appeals did not hold that hearings are necessary to address the results of traditional preoperational tests — those that "involve[] testing of reactor systems to ensure that they meet established, objective 'acceptance criteria' " (*id.* at 29a). To the contrary, the court suggested that such tests might fit within the provisions of 5 U.S.C. 554(a)(3), which excepts from the

Administrative Procedure Act's formal hearing requirement all decisions that "rest solely on inspections, tests, or elections" (Pet. App. 25a-30a).[2]

The Commission currently is determining how to implement the procedural options left open to it by the court of appeals. If it is able to make effective use of those procedural devices — and if the lower courts do not expand the District of Columbia Circuit's reasoning to require the use of hearings to address traditional preoperational testing — the decision below will not result in extensive delays or unduly burden the Commission's administration of the licensing process.

We appreciate that our reading of the decision below may be unduly narrow. It appears, moreover, that the expense imposed upon private industry by the decision might well be substantial (see Pet. 19-21). It is, therefore, with some reluctance that we withhold our support from petitioners. Nevertheless, given all the circumstances, we respectfully submit that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1984

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[2]The court concluded that emergency preparedness exercises do not fit within this exception because the evaluation of such exercises relies on the subjective weighing of reports from a variety of sources, and because exercise results are "just one, not the 'sole,' factor in the Commission's overall [safety] determination" (Pet. App. 27a).